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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1966~~ 72

ALFRED AVANSINO, *et al.*,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 1008

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

These cases arise from separate judgments of the Criminal Court of the City of New York which were consolidated for purposes of appeal.* Petitioner Avansino was convicted on January 7, 1964, for violating §1141 of the Penal Law (OBSCENE PRINTS) and was sentenced to be imprisoned for sixty days and to pay a fine of five hundred dollars, or, alternatively, to be confined for another sixty days.

Petitioner Costanza was convicted on January 23, 1964, for a violation of the same statute, and was sentenced to

* In this and all other respects, the present petition is indistinguishable from No. 626, *Shepard, et al.* v. *New York,* a pending petition for certiorari.

three months imprisonment and to pay a fine of five hundred dollars, or, in lieu thereof, to be committed for an additional three months.

Petitioner Gaggi was also convicted on January 27, 1964, of selling obscene prints (Penal Law §1141) and was sentenced to thirty days imprisonment and to pay a fine of five hundred dollars, or in default of payment, to be confined for another ninety days.

Petitioners Sessa and Strombelline were jointly tried and convicted on February 17, 1964, for violating §1141 of the Penal Law (OBSCENE PRINTS), and were each sentenced to serve a term of thirty days imprisonment and to pay a fine of five hundred dollars, or in the alternative, to be confined for an additional ninety days.

Sessa and Strombelline were thereafter again jointly tried and convicted, on May 28, 1964, for another violation of the same statute. They were each sentenced to prison for thirty days and to pay a fine of five hundred dollars. In case of default of payment, they were to serve an additional thirty days imprisonment.

The Appellate Term of the New York Supreme Court permitted consolidation of the appeals and unanimously affirmed all the judgments of conviction. Leave to appeal to the New York Court of Appeals was denied by Associate Judge STANLEY FULD on November 16, 1965 (appendix to petition).

THE EVIDENCE

1. People v. Avansino

The People's Case

Patrolman **James J. Hemingway** testified that on September 19, 1963, he entered premises 228 West 42nd Street, New York, a "picture" store, and saw the defendant standing behind a cash register at the counter (6-7).* He went to that counter and saw, next to the defendant, a number of cellophane packages containing photographs of partially naked women (7). He selected one of the packages, determined its price from Avansino, and purchased it for $1.50 (8-9). That package (Exh. 1 a-1) contained 12 photographs (10-16) [see *infra* "The Exhibits" for a more particular description thereof]. The defendant then put the photographs in a paper bag and sealed the bag with tape. He then arrested the defendant and seized 392 packets similar in content to Exhibit #1, of which 4 were introduced into evidence, collectively, as Exhibit #2 (16, 20-1).

The Defense

Stanley Hendricks, counsel to the accused, testified that he purchased a copy of *Playboy* magazine. He sought to introduce it into evidence as bearing on the question of "moral climate" (30). Its offer was rejected (31).

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* References are to typewritten Minutes of Trial.

2. People v. Costanza

The Motion to Suppress

Prior to the date of arrest, Patrolman **George Garcia** testified he went to defendant's place of business and purchased four packages of photographs which he submitted to a judge upon an application for a search warrant (63-5). On the date of the arrest he entered the store, purchased four different, but "more or less the same," packages of photographs, showed the defendant the search warrants, and then seized twenty-five additional packages of films (66).

The motion to controvert and suppress was denied.

The People's Case

Patrolman **George Garcia** stated that on August 27, 1963, he entered premises 117 West 42nd Street, New York, and saw the defendant standing behind a counter upon which was a cash register. In front of defendant was a rack containing several packages of photographs, from which the officer selected four packages, and purchased them from the defendant, for five dollars [77-86; Exhs. 1-4]. The defendant placed them in an envelope, and the officer thereafter placed the defendant under arrest (75-6). [The contents of the packages are more particularly described *infra* under "The Exhibits."] After the arrest, 25 additional packages were seized seven of which were later introduced into evidence (87-102; Exhs. 5-12). Upon questioning, defendant stated he was an employee of the store and could sell "all the books, the pictures and the magazines that are in the premises" (103).

The Defense

Stanley Hendricks, counsel to the accused, stated he purchased a copy of *Playboy* magazine which was subsequently introduced, without objection, into evidence.

3. People v. Gaggi

The People's Case

Patrolman **Frederick Jenoure** stated that on April 10, 1963, he entered premises 228 West 47th Street, New York, a book store, and saw the defendant standing close to the cash register, at the counter (137-8). Also on the counter was a box filled with packages of photographs (139). He selected three of these, asked if there were any "better"—to which defendant replied "Isn't that good enough?"—and paid $3.50 for them. After they had been placed in a bag and handed to him, the officers placed defendant under arrest (139-40). The three sets of photographs were introduced into evidence as Exhibits 1-A-C (140-5).

The Defense

There was no defense.

4. People v. Sessa and Strombelline (I)

The People's Case

Patrolman **John A. Kennedy** recounted that on April 10, 1963, he entered premises 117 West 42nd Street, New York, a bookstore, and saw the defendant Sessa standing

near a cash register (156-7). The following transpired between the patrolman and Sessa:

> "And I thumbed through the pictures, and every now and then I took out a pack that I appeared interested in, and a couple of them I handed to Mr. Sessa. I said 'put that on the side for me,' and I went—these were black and whites. I went through the black and white pictures. I asked the defendant if he—I said 'do you have anything a little better than that.' He said 'over here.' He pointed to a different section of the same rack that I was in. He said 'this is a little better, these are in color.' There were many envelopes of color photographs. Appeared to be four pictures in each envelope. And I said to the defendant 'these are very good.' He said 'oh yes, only the best.' I said 'these are the best I have seen around.' He said 'they are the best in the whole Times Square area.'
>
> "Q. You say 'he,' to whom are you referring? A. Sessa.
>
> "Q. Indicating the defendant Sessa. Go ahead? A. 'What makes your pictures better than anybody elses pictures, they are really good.' He said 'we use the best of everything. We use the best material, the best photography.' And then I accumulated a couple of packs of pictures and handed the remainder to the defendant. I said 'okay, I will take them.' " (157-8).

He then selected four packages of colored photographs and two sets of black and white stills, paid the defendant $7.50, and left the store (159-60). Shortly thereafter he returned, saying to Sessa:

> " 'Listen, can I get arrested for having these kind of pictures.' He says 'no, I don't think so.' I said 'well, I am a policeman, you are under arrest for selling pornographic articles.' " (160).

The packets of color photographs were introduced into evidence as Exhibits 1 A-C and the black and white pictures as 3 A-Z against defendant Sessa only.

Patrolman **Patrick Hayden** was also in the store at the time and purchased a book entitled "Promenade Bondage" for $4 from defendant Strombelline (167-9). Strombelline stated, with regard to the book and in response to the officer's request for a "better book", that "this is the best there is" (169). He was then arrested. The book was introduced against Strombelline as Exhibit 4 (171).

The Defense

There was no defense.

5. People v. Sessa and Strombelline (II)

The People's Case

Patrolman **Douglas Ferrary** asserted that on November 1, 1963, he entered premises 117 West 42nd Street, New York, and saw Sessa standing behind the cash register and Strombelline walking about talking to customers (190-3, 207). He selected a package of photographs from the counter immediately in front of Sessa, walked over to Strombelline, and inquired as to its price, which, he was told, was $3.00 (210-11). He returned to Sessa, who put the photographs in an envelope, and then paid the indicated price for them (193-4). He then arrested both men (198). The envelope was introduced into evidence as Exhibit 1. Thereafter, five hundred and twenty-eight additional packages of photographs and twenty-one hundred foot reels of films were seized (198-9).

The Defense

The defense unsuccessfully attempted to introduce a copy of a current issue of *Playboy* magazine into evidence (219).

The Exhibits

The exhibits comprise packets or sets of 8 or 10 photographs each. The photographs are glossy 4″ x 5″ prints of girls, singly or in groups of two or three, clad for the most part in various combinations of undergarments. The models are usually looking seductively at the lens, and are posed to reveal and emphasize the bare breasts and buttocks. Legs are often spread, although the pubis thereby presented is covered, usually by a thin, silk or lace undergarment. The posterior is often elevated and thrust toward the camera. Frequently the models recline or lounge upon unmade beds, and although no sexual acts are depicted, the girls occasionally are shown with legs intertwined, or otherwise in physical contact with each other. Occasionally a girl licks or caresses herself. Thus the common theme of all these photographs is the rather stylized, but nonetheless graphic portrayal of female sensuality and nudity, short of ultimate erotic gratification.

In the first Sessa-Strombelline trial a publication entitled "Promenade Bondage" was introduced into evidence against the defendant Strombelline. The book is akin to those recently held to be obscene in *Mishkin* v. *New York*, 34 U. S. L. W. 4250 (March 21, 1966) in that it is a cheaply prepared paperbound "pulp." On the cover is displayed a

photograph representative of those contained within and which is surrounded, in bold-face print, by the words "fighting," "spanking" and "all new photos." The text (printed, incidentally, by the photo-offset process) is a ridiculous account of a *menage-a-trois* consisting of three women who are, inexplicably, devoted to the task of physically belaboring each other. Each in turn, and without any apparent motive, binds the other in a humiliating position and then administers a vicious and completely senseless beating to the hapless victim. The narrator describes each whipping and spanking in loving detail, and waxes ecstatic over each welt raised, every bruise incurred. Accompanying the text are a series of candid photographs picturing the events described on each preceding page. The girl models are shown in a variety of poses, but a favorite seems to be a portrayal of a woman tied to a chair or bed, her legs spread apart, as would be viewed by an observer standing in the vicinity of her feet.

In short, the publication is typical of its *genre*: that obscene catering to perverted prurience, proscribed by a majority of this Court in the *Mishkin* decision.

POINT I

The book and photographs were properly found to be obscene.

Petitioners do not, in this case, quarrel with the finding that the various exhibits are obscene (they content themselves with the observation that "sexually provocative photographs and books are not necessarily obscene" (pet. p. 26)); rather they take issue with various procedures

adopted by the trial court in making that determination, and contend, as to those procedures, that they prevented the constitutional issue from fairly being litigated. Thus they argue that they were improperly hampered in their efforts to prove contemporary community standards, that the prosecution itself committed error in not proving those standards, and lastly, that the trial court erred in not articulating the criteria by which it determined the various exhibits to be pornographic.

In several of these cases defense counsel sought to offer into evidence current issues of *Playboy* magazine for the avowed purpose of demonstrating the prevailing "moral climate" (28). In *People* v. *Costanza* the offer was accepted in the absence of an objection; in *People* v. *Avansino* and *People* v. *Sessa and Strombelline* (II) the evidence was rejected, in *Avansino* because the People objected, and in the second *Sessa and Strombelline* trial on the court's own motion. Relying on the concurring opinions of Justices FRANKFURTER and HARLAN in *Smith* v. *California,* 361 U. S. 147 (1959), petitioners contend that the rejection of evidence offered for that purpose constitutes reversible error.

Although the mode of procedure for establishing standards of community acceptance is necessarily flexible, it would appear that the petitioners must be accorded some opportunity to offer proof on this subject. Moreover, the courts of the State of New York do not, as a rule, prevent defendants from adducing competent evidence tending to demonstrate the limits of community tolerance. However, such an offer is subject to the general evidentiary requirement that a proper foundation be laid in order to avoid an unnecessary and confusing multiplication of issues. In

People v. *Finkelstein,* 11 N. Y. 2d 300 (1962), Judge FROESSEL set forth the condition under which the New York courts would accept such extrinsic evidence.

> "In our opinion, the proffered evidence was properly excluded, as it was irrelevant to the issue of whether or not the two books sold by defendants in this case were obscene. The fact that certain other and different publications were *seen* in bookstores and on magazine stands in New York City is no indication that they were *sold,* or *read,* or that to the average person applying contemporary community standards (*Roth* v. *United States, supra*) they were not obscene." *People* v. *Finkelstein,* 11 N. Y. 2d 300 at 305. (emphasis in text)

Chief Judge DESMOND commented upon the reason for that rule in a separate opinion:

> "Where there is conclusive proof of the sale of that sort of thing [booklets incontestably found to be obscene] by one who knows what he is selling, it is absurd for the court to take proof from either party of other sales of other dirty books by other vendors." 11 N. Y. 2d at 306.

Hence New York insists—and not unreasonably—that the offer be accompanied by a showing that the comparative material is itself either sold or read, and further, that it is acceptable to the community. However, petitioners here did not observe the firm requirements of the state law with regard to such evidence, but rather, simply sought to insert a magazine into evidence without laying a proper foundation. Under these circumstances its rejection by the trial court was obviously warranted.

Petitioners also assert the converse proposition: that these convictions cannot be sustained in the absence of some

proof by the State (other than the book and photographs themselves) that the evidence satisfies the obscenity standards first formulated in *Roth* v. *United States*, 354 U. S. 476 (1957). Assuming that the trial court applied those standards to the evidence at hand, however, petitioners' assignment of error is plainly incorrect. For as noted in the recent case of *Ginzburg* v. *United States*, 34 U. S. L. W. 4255 at 4256:

> "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

Thus neither party need adduce such evidence, although as related above, neither side can be barred from proving or disproving the *Roth* standards, provided such proof is probative of the immediate issue and does not carry the inquiry too far afield.

Since *nisi prius* did not elaborate upon the criteria used in determining the question of obscenity, petitioner gratuitously speculates that the court may well have employed standards other than those sanctioned by *Roth*. But all of these cases were tried by a panel of judges in the absence of a jury. These judges, it can safely be presumed, were cognizant of the law with regard to obscenity and applied the appropriate standards in assaying the evidence before them. For them to have to charge themselves on the law would be little short of ridiculous. Just as the appellate court which affirmed the judgments of conviction was not under the necessity of enunciating the *Roth* test in its order, so the trial judges were not bound to discourse upon the law.

Lastly, the question raised by petitioner in his first point—whether sado-masochistic books such as that confiscated from petitioner Strombelline can be deemed to be obscene—has been conclusively answered by this Court. They can be [*Mishkin* v. *New York*, 34 U. S. L. W. 4250 (1966)].

POINT II

The constitutional requirement of *scienter* was conclusively established by the proof at the trial.

An issue is raised in the present petition as to the mental element of *scienter* required in obscenity prosecutions. It is argued here, as it was in *Mishkin*, that a defendant must know that his wares are obscene. This argument, however, was explicitly rejected by this Court in the *Mishkin* decision and full approbation given to New York's definition of the amount of knowledge requisite to sustain a conviction. In *People* v. *Finkelstein*, 9 N. Y. 2d 342, 345 (1961), the Court of Appeals determined that "only those who are in some manner aware of the character of the material they attempt to distribute should be punished." It would be exceedingly difficult, given the circumstances under which each petitioner was arrested, for them to claim that the State failed to meet the *Finkelstein* burden of proof, for they must have been aware, at the very least, of the contents of the various packages.

Petitioners Avansino and Costanza were stationed behind counters on top of which were racks filled with packages of similar photographs. They were each shown, in order to ascertain their purchase price, the packages of photographs which formed the subject matter of the prosecution. Each was wrapped with transparent cellophane,

and hence, the semi-nude or nude models were clearly visible. Additionally, petitioners Gaggi, Sessa, and Strombelline made statements, during the course of the various transactions, indicating that they were cognizant of the nature of the material sold, and, indeed, had compared it with other such material, and were prepared to vouch for its "quality." Furthermore, petitioners Sessa and Strombelline had certainly been alerted to the risks involved in purveying this sort of material by their first arrest, yet continued to sell it, resulting in their being arrested a second time on precisely the same charge.

Thus, the petitioners knowing the contents and nature of their materials, *scienter* was established. In the absence of any proof tending to rebut such knowledge on their part there is no reason for not making them responsible for their intentional acts.

POINT III

The exhibits were lawfully seized.

Petitioner Costanza argues that he was subjected to an illegal search in that a warrant was issued to search his place of business without a prior adversary determination. In support of this contention he relies upon two cases: *A Quantity of Books* v. *Kansas,* 378 U. S. 205 (1964) and *Marcus* v. *Search Warrants,* 367 U. S. 717 (1961). But in both of these cases, the State sought to enjoin the distribution of certain literary works—they were not criminal prosecutions. The Court insisted that because seizure of large quantities of literature prior to a determination of obscenity might infringe on both the public's and the distributor's First Amendment rights, an adversary proceeding to de-

termine the question of obscenity must proceed any large-scale seizure. The sequestration preceding a criminal prosecution stands on an entirely different footing, for the purpose is not the suppression of matter assumed by the authorities to be obscene but rather the familiar gathering of evidence prior to trial. In this case both the material deemed obscene and the defendant are accorded the full protection of due process attendant upon every criminal prosecution. Indeed, it was these very protections with which the Court sought to surround the civil injunctive proceedings in the two cases mistakenly relied upon by petitioner.

In sum, it has never been held that the normal processes of the criminal law are arbitrary in initiating prosecutions for dissemination of obscene prints. The petitioner's constitutional rights are more than sufficiently protected by the adversary proceedings occurring after arrest and upon the trial of the action.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

AVANSINO ET AL. *v.* NEW YORK:

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE ~~DIVISION~~ TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 72. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate ~~Division~~ TERM of the Supreme Court of New York, First Judicial Department, is reversed. *Redrup* v. *New York*, 386 U. S. ——, decided May 8, 1967.

THE CHIEF JUSTICE and MR. JUSTICE CLARK would affirm. *Mishkin* v. *New York*, 383 U. S. 502.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.